82-1747

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

ETHEL HAMILTON, ET AL.

Appellants

vs.

WILFORD STOVER

Appellee

MOTION TO DISMISS

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QUESTION PRESENTED

Appellee accepts the Appellant's statement of the Question Presented.

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JURISDICTION

The Appellee accepts the Statement of Jurisdiction as presented by the Appellants.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

FOURTEENTH AMENDMENT (in pertinent part):

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section R.C. 701.02 (in pertinent part):

> Policemen shall not be personally liable for damages for injury or loss to persons or property and for death caused while engaged in the operation of a motor vehicle while responding to an emergency call.

STATEMENT OF THE CASE

The Appellee accepts the Appellants' Statement of the Case except in the following particulars:

The Appellants' decedent, Glen Hamilton, had been followed for some distance by the municipal police cruiser driven by Wilford Stover. While following Glen Hamilton, Wilford Stover had his siren blowing and all emergency lights activated. Instead of the Appellants' decendent pulling to the right side of the road and stopping, he made a left-hand turn into his residence as the police cruiser was passing him, resulting in a collision causing the death of the Appellants' decendent. All facts indicate that the Appellee, Wilford Stover, was responding to an emergency call from another village policeman.

REASONS REQUIRING DISMISSAL OF APPELLANTS' APPEAL

A REASONABLE PUBLIC POLICY EXISTS FOR THE DOCTRINE OF SOVEREIGN IMMUNITY WHICH HAS BEEN ADDRESSED BY THIS COURT ON SO MANY OCCASSIONS, ITS BASIS NEEDS NO FURTHER REVIEW AND, THEREFORE, PRESENTS NO SUBSTANTIAL QUESTION.

The Appellant seeks to achieve by judicial fiat the elimination of the concept of sovereign immunity of a state or municipality from suit in its own Court when, in fact, Federal and state legislation, as well as established case law, recognize its existence and leave to legislative determination the extent to which the state may decide to waive the immunity which it has, see Nevada v. Hall, 440 U.S. 410 (1979). In this case, the State of Ohio has determined not to waive sovereign immunity for municipal police officers on an emgergency call. Such a legislative determination represents a reasonable conside-

ration for the need to supply protection to persons and property within a municipality without an officer having to fear that his discretionary judgment may create personal liability.

Historically, it was argued by Hamilton in The Federalist No. 81, at 567 (Dawson ed. 1837) that:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and general practice of mankind in the exemption as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states and the danger intimated must be merely ideal.

The case of Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), however, determined that in spite of Hamilton's assertion, a state was liable to be sued by a citizen of another state or of a foreign country. This resulted in the passage

of the Eleventh Amendment which provided that:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.

Subsequent to the passage of the Eleventh Amendment, in the case of Hans v. Louisiana, 134 U.S. 1 (1890), the Appellant attempted to argue that the Eleventh Amendment spoke only of suits by citizens of other states against the state and thereby did not prohibit a suit by a citizen of his own state against that particular state. The Court in addressing this issue, held:

> It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that when the Eleventh Amendment was adopted it was understood to be left open for

> citizens of a State to sue their own State in the federal courts whilst the idea of suits by citizens of other States or of foreign states was indignantly repelled? Suppose that Congress when proposing the Eleventh Amendment had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: Can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

A direct suit by a citizen of the state of Arkansas brought in that state to recover interest due on certain bonds issued by the state was dismissed for failure of the plaintiff to attach the bond to his complaint as was required by statute passed by the state of Arkansas subsequent to the filing of the complaint. On appeal to the Supreme Court, through Chief Justice Taney held:

> It is an established principal of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or in any other without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be a defendant in a suit by individuals or by another state and as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued and the manner in which the suit shall be conducted and may withdraw its consent whenever it may suppose that justice to the public requires it. Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1858). See also Nevada v. Hall, supra.

It is well settled that the immunity accorded to the several states, if they so desire to exercise it, cannot be circumvented by an action against an officer of that state who professes to act in obedience or enforcement of those laws, see Louisiana v. Jumel, 107 U.S. 711 (1883); Hagood v. Southern, 117 U.S. 52 (1886); Ex Parte Ayers, 123 U.S.

443 (1887). Additionally, it has been well recognized that an officer of the state while acting in his official capacity, will not be held liable for his action or nonaction where it involves the exercise of discretion and is not merely ministerial, see Bradley v. Fisher, 80 U.S. 335 (1872).

The police officer Appellee, as an employee of the village under the circumstances and facts of this case, is in a unique position since he must bear alone the full weight of the losses he causes unless provision is made to protect him by insurance or the state, by gratuity, determines to reimburse him for his loss. Professor Robson basically sumarized this situation of state immunity coupled with officer liability in the following words:

> The liability of the individual official for wrongdoing

> committed in the course of his duty on which so much praise has been bestowed by English writers is essentially a relic from past centuries when government was in the hands of a few prominent, independent and substantial persons so-called Public Officers who were in no way responsible to to ministers or elected legislatures or counsels. ... Such a doctrine is utterly unsuited to the 20th Century state in which the public officer has been superseded by armies of anonimous and obscure civil servants acting directly under the orders of their superiors who are ultimately responsible to an elected body. The exclusive liability of the individual officer is a doctrine typical of a highly individual common law, it is of decreasing value today. Robson, Report of the Committee on Ministers Powers, 3 Pol. Sci. Q. 346, 357-358 (1932).

The recognition of the immunity of the state and its officers is best exemplified on a Federal level in the Federal Tort Claims Act, 28 U.S.C., §1291, 1346, 1402, 1504, 2110, 2401, 2402, 2671, et. seq. This Act basically

recognized the need of the Federal government to waive sovereign immunity from suit for certain specified torts of Federal employees. It, however, did not insure injured persons damages for all injuries caused by such employees. Similarly, Ohio has by Ohio Revised Code §701.02 refused to waive immunity of its municipalities and certain officers acting on their behalf during certain emergency situations. On the Federal level, in the case of Dalehite v. United States, 346 U.S. 15 (1953), the Court noted in finding that there was no remedy for the plaintiffs under the Federal Torts Claim Act stated that:

> The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to persons and property occassioned by the tortuous conduct of its agents acting within their scope of business, it was not contemplated that the Government

> should be subject to liability arising from acts of a governmental nature or function. [P. 27, 28]

In analyzing the concept of liability, the Court indicated that the basis for the interpretation of the Federal Tort Claims Act and its reasoning in analyzing that Act should start from the accepted jurisprudential principal that no action lies against the United States unless the Legislature has authorized it. Dalehite v. the United States, supra., 30.

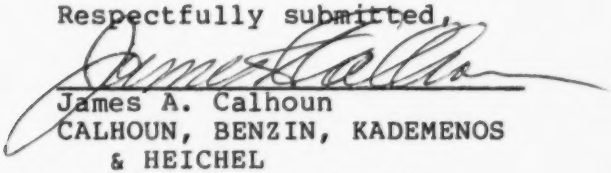
It is interesting to note that one of the allegations of the plaintiffs in Dalehite, supra., was that the government was negligent in its failure to properly fight the fire which errupted as a result of the explosion of the fertilizer cargo. In addressing itself to that issue, the Court noted:

> It [The Federal Tort Claims Act] did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights...[In] fact, if anything is doctrinally sanctioned in the law of torts, it is the immunity of communities and other public bodies for injuries due to fighting fire...that cities by maintaining firefighting organizations assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. [pp. 43, 44].

Appellee, therefore, requests that the Court dismiss the Appellants' appeal for the reason that the Ohio statute represents a nonwaiver of immunity which is accorded to the state and its municipalities and its officers thereof for valid public policy reasons based on

sound prior judicial decisions and well recognized state and Federal legislation.

Respectfully submitted,



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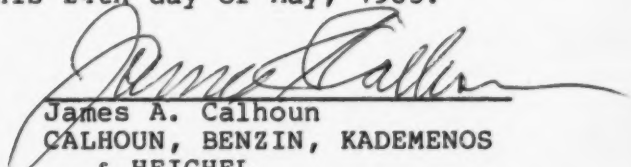
CERTIFICATION

The undersigned hereby certifies that a copy of the foregoing Motion to Dismiss was served upon Benjamin B. Sheerer, Paula Goodwin and Elizabeth Reilly, Attorneys for Appellants, at 614 Superior Avenue, West, Suite 611, Cleveland, Ohio, 44113, by U.S. ordinary mail on this 24th day of May, 1983.



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